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UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

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IN RE: THE FINANCIAL OVERSIGHT
AND MANAGEMENT BOARD FOR
PUERTO RICO,

as representative of

3:17-BK-3283 (LTS)

THE COMMONWEALTH OF PUERTO RICO,
et al.,

Debtors.

(Jointly Administrated)

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IN RE: THE FINANCIAL OVERSIGHT
& MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

3:17-BK-4780 (LTS)

PUERTO RICO POWER AUTHORITY,

Debtor.

(Jointly Administrated)

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Motion Hearing
December 20, 2017
8:40 a.m.

Before:

HON. LAURA TAYLOR SWAIN,

District Judge

HON. JUDITH G. DEIN,

Magistrate Judge

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ALSO PRESENT: Chief Judge Barbara J. Houser, Mediation Team
United States Bankruptcy Court
Northern District of Texas

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1 THE DEPUTY CLERK: This case is In Re The Financial
2 Oversight and Management Board for Puerto Rico as
3 representatives of The Commonwealth of Puerto Rico, et al.,
4 PROMESA Title III, 17 BK 3283-LTS.

5 JUDGE SWAIN: Again, good morning. And welcome to
6 counsel, parties-in-interest, members of the public, and the
7 press, those in San Juan, and those who are observing by
8 telephone. We continue to have in mind and heart our fellow
9 American citizens who are working to rebuild their lives on the
10 Island of Puerto Rico and to rebuild the Island of Puerto Rico.

11 I remind you that consistent with Court and Judicial
12 Conference policies and the orders that have been issued, there
13 is to be no use of any electronic devices in the courtroom to
14 communicate with any person, source or outside repository of
15 information, nor to report any part of the proceeding.

16 So, all electronic devices must be turned off unless
17 you're using a particular device to take notes or to refer to
18 notes or documents that are already loaded on the device.

19 All audible signals, including vibration features,
20 must be turned off. No recording or retransmission of the
21 hearing is permitted by any person, including, but not limited
22 to, the parties or the press. And anyone who is observed or
23 otherwise found to have been texting, emailing, or otherwise
24 communicating or recording with a device during the court
25 proceeding will be subject to sanctions, including, but not

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1 limited to, confiscation of the device and denial of future
2 requests to bring devices into the courtroom.

3 I would just remind counsel who are presenting to
4 speak from the podium into the microphone and project, so that
5 everything will be clear for everyone in all of the venues.

6 So, I would like to start by inviting Judge Houser,
7 the mediation team leader, to the podium to make a status
8 report.

9 JUDGE HOUSER: Good morning, Judge Swain.

10 JUDGE SWAIN: Good morning, Judge Houser.

11 JUDGE HOUSER: I appreciate the opportunity to update
12 you and the other parties-in-interest on the work of the
13 mediation team on these Title III cases.

14 As I explained --

15 JUDGE SWAIN: I'm sorry, one minute.

16 JUDGE HOUSER: No worries.

17 (Pause)

18 JUDGE SWAIN: Apologies to the people who are
19 listening by phone. I understand it's a little bit fuzzy, but
20 we're going to continue.

21 And sorry for the interruption, Judge Houser.

22 JUDGE HOUSER: No worries.

23 As I explained to the parties-in-interest when I last
24 addressed the Court, a key component of our mediation process
25 is that the process is confidential. This will allow

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1 parties-in-interest to have open and frank conversations with
2 the mediators and with each other. By having these open and
3 frank conversations, I believe we can find common ground that
4 will assist us in the development of confirmable or
5 substantially consensual plans of adjustment.

6 We have scheduled formal mediation sessions on certain
7 of these disputed legal issues throughout the first quarter of
8 2018. Since the last time of these hearings, the mediation
9 team has worked diligently to assist the parties in identifying
10 these critical disputed legal issues that are in dispute among
11 them, the resolution of which we hope, through settlement, will
12 assist the parties in developing confirmable plans of
13 adjustment in these cases.

14 As the parties know, the oversight board and AAFAF are
15 in the process of developing new five-year fiscal plans for the
16 commonwealth and certain other instrumentalities. Because the
17 development of these new fiscal plans is important to all
18 stakeholders in these cases, the mediation team is working with
19 the parties to facilitate the development of these fiscal plans
20 in as collaborative a process as possible prior to their
21 anticipated certification by the oversight board in early 2018.

22 As I just mentioned, the mediation team will resume
23 formal mediation sessions on critical disputed legal issues in
24 dispute among the parties shortly after the new year. Parties
25 have either submitted, or will be submitting, confidential

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1 merits mediation statements to the mediators. These
2 confidential merits mediation statements will allow the members
3 of the mediation team to better understand the parties'
4 positions on the legal and factual issues in dispute among
5 them, so that we may assist them in attempting to negotiate a
6 consensual resolution of these issues.

7 I have assigned various members of my mediation team
8 to be responsible for particular issues based upon the various
9 factors, including availability and expertise of a particular
10 member or members of the mediation team.

11 To be sure, prehurricane, these cases presented
12 enormously challenging debt restructures that I believe would
13 require the cooperation, ingenuity, and diligence of all
14 involved to accomplish. Hurricane Maria has added layers of
15 complexity to the development of confirmable plans of
16 adjustment in these cases. However, I remain highly confident
17 that if the parties and the mediators continue to work
18 together, and perhaps work together even more cooperatively in
19 the new year, we will be able to restructure the prepetition debt
20 on a consensual or substantially consensual basis. The
21 mediators remain committed to this goal.

22 As a point of personal privilege, I will share that
23 Judge Ambro sent me a holiday card this year, and as you all
24 know, Judge Ambro is a critical member of the mediation team.
25 And within that holiday card, his wishes for me -- I'm going to

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1 expand because I know his wishes for all of us -- are
2 confirmable plans of adjustment in 2018.

3 You heard it here first. That is certainly the goal
4 of the mediation team, and who better to express it than our
5 Third Circuit Court of Appeals judge member of that team.

6 Judge Swain, thank you for the opportunity to update
7 you and other parties-in-interest on the work of the mediation
8 team in these cases.

9 JUDGE SWAIN: Thank you, Judge Houser.

10 And thanks to all of us for the dedicated work that
11 you and your team members are bringing to this effort.

12 JUDGE HOUSER: You're welcome.

13 JUDGE SWAIN: I would now invite the oversight board,
14 Mr. Bienenstock, to make a status report and just one moment.
15 One moment.

16 (Pause)

17 JUDGE SWAIN: The A/V specialist is here, so perhaps
18 we can have a little sound test before you get into the body of
19 the report. We're having that buzzing again.

20 (Pause)

21 JUDGE SWAIN: Thank you for your patience,
22 Mr. Bienenstock.

23 MR. BIENENSTOCK: Good morning, Judge Swain. Martin
24 Bienenstock, of Proskauer Rose LLP, as attorneys for the
25 Oversight Board for itself as Title III representative.

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1 Our understanding is that the Court requested a status
2 report on the bar date motion, which I will give, and I'm happy
3 to answer any other questions that your Honor might have.

4 In respect of the bar date motion, on September 12,
5 2017, the oversight board filed it, and it was scheduled to be
6 heard October 4. In the interim, between filing and the
7 scheduled hearing, the board received comments from various
8 parties having differing concerns turning on the types of their
9 constituents, the mechanics, the need, et cetera.

10 Then on September 20, 2017, Hurricane Maria landed.
11 On September 26th, the Court adjourned the October 4 omnibus
12 hearing. And then on October 13, 2017, after consultation with
13 AAFAF, and in consideration of the feedback from attorneys for
14 the retiree committee, various unions, and other parties, and
15 taking into account the conditions in the commonwealth, the
16 oversight board determined it was in the best interests of all
17 parties not to attempt to serve bar date notice and impose the
18 burden on parties to complete the materials and have proofs of
19 claims filed by what had been the proposed bar date. So the
20 oversight board withdrew the bar date motion without prejudice.

21 Since withdrawing the motion, the oversight board
22 continued to monitor conditions on the island. Now, our
23 understanding, as of two days ago, is basically as follows:
24 The U.S. Postal Service is receiving mail and making deliveries
25 directly to residences and businesses on the island where it is

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1 safe to do so, and that's approximately 95 percent of the
2 island. Where USPS is unable to make -- the U.S. Postal
3 Service is unable to make direct deliveries, the residents and
4 businesses must collect mail at local post offices. However,
5 the postal service is not providing notification to residents
6 and businesses of pending mail in those instances. In four
7 towns, residents must travel to a different town to collect
8 mail at the nearest U.S. postal office.

9 JUDGE SWAIN: Mr. Bienenstock, it seems the phone has
10 gotten disconnected, so we have to reconnect.

11 MR. BIENENSTOCK: Sure.

12 (Pause)

13 JUDGE SWAIN: Ms. Ng, are we reconnected yet?

14 THE DEPUTY CLERK: Not just yet.

15 We're good.

16 JUDGE SWAIN: All right.

17 I understand that the Court Solutions line is now
18 reconnected. Mr. Brown, do you have someone --

19 MR. BROWN: I'm waiting for a response.

20 JUDGE SWAIN: All right. So should we wait to begin
21 until you get that response?

22 MR. BROWN: Yes, I think we should wait a little bit
23 until we get a response.

24 JUDGE SWAIN: Okay.

25 MR. BROWN: We're good.

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JUDGE SWAIN: All right, we're good.

I understand that the call dropped shortly after you began speaking, and, so, Mr. Bienenstock, I'm afraid I'm going to ask you to start from the top.

MR. BIENENSTOCK: Okay. Sure.

Your Honor, our understanding was that the Court desired a report on the bar date motion and -- which I will provide and certainly answer all other questions the Court might have.

Originally, the oversight board had filed the bar date motion on September 12th, and it was scheduled to be heard on October 4, 2017. The oversight board received comments from numerous groups of stakeholders in respect of the mechanics of bar date, the need for it, and methods of complying with filing proofs of claims by deadlines from different types of constituents. It went from retirees, on the one hand, having their particular issues, to holders of pieces of debt where there were agents, or indentured trustees or others who might be able to file on behalf of all holders.

So, we tried to take all of that into account and resolved, I think, mostly all the issues to our knowledge.

Then, on September 20, Hurricane Maria hit the commonwealth. On September 26, 2017, the Court adjourned the October 4 omnibus hearing for obvious reasons, and the bar date motion was also adjourned to November 15 by the Court's order

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of September 29.

On October 13, after consultation with AAFAF and consideration of feedback from attorneys for the retiree committee, various unions, and other stakeholders, the oversight board determined it was in the best interests of all parties-in-interest not to attempt to serve the bar date notice and impose the burden on parties to complete the materials and have the proofs of claims filed by the proposed bar date. Accordingly, the oversight board withdrew the bar date motion without prejudice.

Since then, the oversight board has continued for that reason, and many other reasons, to monitor conditions on the island, and our understanding, as of December 18, is that the U.S. Postal Service is receiving mail and making deliveries directly to residences and businesses on the island where it is safe to do so, and that now comprises approximately 95 percent of the island.

Where the postal service is unable to make direct deliveries, the residences and businesses must collect mail at local post offices. However, they do not get prior notification from the postal service that they have mail to pick up. In four towns, residents must still travel to a different town to collect mail at the nearest postal office, which could be up to approximately five miles away.

Taking all of that into account, and, also, the

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oversight board is 100 percent in accord with Judge Ambro's wishes to Judge Houser and everyone else, that we reach confirmable plans, hopefully consensual ones, in 2018.

The oversight board currently contemplates the following timeline and procedures for what would be its second bar date motion:

We would file a new bar date motion that could be heard on February 7, 2018, at a scheduled omnibus hearing, with the bar date -- the proposed bar date to occur several months thereafter. It is -- we believe, based on what we know now, that that time frame will address all of the logistical hurdles that still remain.

The specifics are as follows: We would file the motion on January 16 or on or before January 16. On February 26, there would be a -- if the Court grants the bar date motion, February 26 would be a deadline to serve the bar date notice, proof of claim form, and additional notices specified in the proposed order. May 28, 2018, would be the general bar date.

The proof of claim form will have Spanish translations on instructions. The proofs of claim may be filed in English or Spanish. And the methods of filing the proofs of claims would include the customary methods, first class mail, overnight courier, hand delivery, and electronic filing on Prime Clerk's website, and the oversight board is exploring

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1 additional methods of filing with AAFAF and Prime Clerk to ease
2 the burden on those creditors who would otherwise have problems
3 doing it.

4 I wanted to emphasize that this is not a case where a
5 bar date motion is being requested out of any type of gotcha
6 game where if someone doesn't file, they don't get a
7 distribution. It's being urged because it's very important,
8 together with all the financial data, that we have an idea of
9 the universe of claims and want to be sure that what we believe
10 is the universe of claims is actually the universe of claims.

11 Your Honor, that's the end of my report. As I said,
12 I'm happy to answer any other questions your Honor might have.

13 JUDGE SWAIN: I thank you for that report. And I
14 asked you to make it at this time because people have been sort
15 of doing do-it-yourself claim filings, and I am concerned that
16 there be some accessible regularity of process, and that Prime
17 Clerk be able to correlate claims filed through the Prime Clerk
18 process with claims that are filed on the court website, and
19 so -- the ECF system, and so I am glad to hear that you are
20 continuing to refine the process, and that it will be a process
21 that is navigable in English and in Spanish.

22 And by way of comment as to the proposed bar date, I
23 am glad to hear that you are contemplating leaving a
24 substantial period of time. While we are all hopeful and
25 encouraging of the plans for restoration of electricity to the

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1 island and everything else, if it turns out that it's longer
2 than currently expected before telecommunications, and Internet
3 access, and mail access truly become easily navigable for
4 individuals, I will expect that you will think about whether
5 that period needs to be lengthened a bit longer --

6 MR. BIENENSTOCK: Absolutely.

7 JUDGE SWAIN: -- and whether, even after the first
8 general distribution of notices, there are some other reminder
9 noticing procedures to make sure that people who might not have
10 been in communications at the time of the first wave of
11 noticing went out are made aware of what to do.

12 MR. BIENENSTOCK: Thank you, your Honor. We will add
13 reminder notices. I think that's a great idea.

14 JUDGE SWAIN: Thank you.

15 Are the timetables that have been announced for
16 revisitation of the physical plans still the relevant
17 timetables?

18 MR. BIENENSTOCK: They are the relevant timetables.
19 There have been requests for some modest extensions, and the
20 board is considering them.

21 JUDGE SWAIN: Thank you.

22 Those were my only further specific questions. If
23 there's anything else you'd like to share, it's your podium.

24 MR. BIENENSTOCK: Not at this time, your Honor. I
25 think other things will come up in the course of today's

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1 hearing. I don't want to duplicate.

2 JUDGE SWAIN: Thank you, Mr. Bienenstock.

3 So, the next matter on the agenda is the uncontested
4 matters section, which is cued up to begin with the GAM Realty
5 lift stay motion, and as to that, who is the speaker?

6 Who is speaking to the GAM lift stay motion as to
7 which there is a proposed consensual order?

8 Well, I don't need a presentation. The presentment
9 notice provided for objections by yesterday or the day before.
10 There have been none. I would have simply entered it, but it
11 was on the agenda, so the opportunity has been given. I will
12 simply take it on presentment and enter it.

13 Then I understand that one of the matters that had
14 been noticed up as a contested matter, the joint insurance
15 proceeds motion, has been resolved. So, shall we address that
16 now?

17 MR. HAYNES: Yes, your Honor.

18 JUDGE SWAIN: Please come to the podium.

19 MR. HAYNES: Good morning, your Honor. Nathan Haynes,
20 from Greenberg Traurig, for AAFAF, as fiscal agent for PREPA.

21 JUDGE SWAIN: Good morning, Mr. Haynes.

22 MR. HAYNES: Good morning.

23 Your Honor, this is a now uncontested joint motion
24 concerning the receipt of PREPA's insurance proceeds. The
25 motion was filed jointly by AAFAF and the oversight board. The

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1 purpose of the motion is to provide PREPA -- PREPA's property
2 insurance carriers with some comfort that they will not be
3 subject to double payment by making an advance under the
4 policy.

5 JUDGE SWAIN: Would you project just a bit more.

6 MR. HAYNES: Yes, your Honor. Thank you.

7 JUDGE SWAIN: Thank you.

8 MR. HAYNES: Your Honor, I do have a short
9 presentation, but if your Honor has had the opportunity to
10 review the revised proposed order, I'm happy to be seated
11 unless you have questions. I'm also happy to run through it
12 shortly or quickly for you.

13 JUDGE SWAIN: I have reviewed all of the papers and
14 the revised proposed order. I have no particular questions or
15 concerns about the revised proposed order, and I understand how
16 you got there and the concerns to which the revisions meant to
17 respond. And so, since you've confirmed now that there is no
18 further opposition to the order as proposed, I will take it on
19 submission and enter it after this hearing.

20 MR. HAYNES: Thank you, your Honor.

21 JUDGE SWAIN: Thank you, Mr. Haynes.

22 I will now turn the bench over to Judge Dein for the
23 2004 motion.

24 JUDGE DEIN: Good morning, everyone here and in Puerto
25 Rico. I'm happy to have no one appear to argue this motion.

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1 Am I that lucky, or are people actually going to argue
2 this motion?

3 MS. MILLER: Good morning, Judge Dein. It's Atara
4 Miller, from Milbank Tweed Hadley & McCloy, on behalf of Ambac
5 Assurance Corporation.

6 I want to make a few brief comments, but I do hope
7 that AAFAF will agree, at the end of this presentation, that
8 we're going to continue to meet and confer, and, so, while I
9 will make a very brief presentation, there may not be --

10 JUDGE DEIN: Half my wishes. Okay.

11 MS. MILLER: Your Honor, just this week, in response
12 to AAFAF's disclosure on Monday morning of almost \$7 billion of
13 cash of various government accounts, many of which cash
14 balances were previously unknown to the public or inconsistent
15 with numbers that had previously been disclosed, Jose Carrion,
16 the chairman of the oversight board, said -- and I want to
17 quote this because I think it should be the guiding principle
18 in these cases, and particularly on these 2004 motions -- "It
19 is essential that we improve the transparency and
20 accountability of public finances to put Puerto Rico on the
21 road to economic recovery, regain access to the capital
22 markets, and restructure its immense debts."

23 Your Honor, we have been before you many times now on
24 2004 discovery motions where there has been consistent
25 objection by both the commonwealth and the oversight board to

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1 pretty much anything the creditors are asking for. And, so,
2 I'm quite pleased to be able to stand before you this morning
3 and report that, as we were coming into court, AAFAF -- we, and
4 AAFAF, and the oversight board had a very brief meet-and-confer
5 where I think that the commonwealth has agreed to produce to
6 Ambac many of the core pieces of data and financial information
7 that we requested in this motion and that really are essential
8 to understand not just what the current existing SUT cash
9 position is, but what is really -- you know, what the breakdown
10 of those numbers are, what the underlying basis is. There are
11 some concerns about specific retailer information, which AAFAF
12 can't provide pursuant to Puerto Rico law, and we're trying to
13 figure out ways to get that information, so that creditors can
14 really understand what the economic drivers on the SUT are and
15 how to use that information and the numbers that we get to be
16 able to project forward five years, ten years, fifteen years,
17 and much longer out pursuant to the COFINA bonds.

18 So, I think that the best -- we haven't agreed on
19 everything yet, and so I think our suggested proposal would be
20 that we continue to meet and confer, and to the extent that the
21 parties can't agree, or that there are outstanding disputes,
22 that we raise them with your Honor outside -- in a conference
23 outside of the omnibus hearings by motion. And we would like
24 to target having a hearing, if possible, either in person in
25 Boston or telephonically sometime in the first two weeks of

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1 January, so that we can make sure that things are moving
2 forward.

3 JUDGE DEIN: Do you want a date for a status report to
4 me? Does that make sense?

5 MS. MILLER: I think that makes sense. January 3rd or
6 January 5th probably makes sense.

7 JUDGE DEIN: You have to write it, so I don't care
8 whether it's the 3rd or the 5th, but why don't I just say the
9 5th and submit a status report. You can say you're still
10 talking, but at least I'll have some idea what's going on
11 there.

12 MS. MILLER: Great.

13 JUDGE DEIN: And I expect that we can certainly make
14 time for a hearing sometime in that time frame, in the
15 beginning of January.

16 Do you want to be heard?

17 MS. MILLER: Thank you, your Honor.

18 MR. CANTOR: Thank you, your Honor. Daniel Cantor,
19 O'Melveny & Myers, on behalf of AAFAF.

20 I'm pleased to hear Ms. Miller's approach. We think
21 it's the right approach. We think it's, quite frankly, the
22 approach that should have been taken all along rather than
23 going forward with the motion.

24 But in the spirit of cooperation, I will limit my
25 remarks to saying that we look forward to meeting and

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1 conferring with Ambac and any other interested parties to try
2 and reach a consensual resolution. Transparency is a good
3 thing, but it is not such an overriding interest, that it
4 strips the government of its rightful powers and
5 responsibilities.

6 Thank you, your Honor.

7 JUDGE DEIN: I'll accept those dates on a status
8 report, and then I'll be available for hearing, if necessary.

9 The process, it seems to me, is starting to really
10 work, and I think that's great. I think the requests should be
11 more specific, I think the responses need to be more directly
12 responsive, and we all have our legal positions, and now we
13 have to deal with more concrete requests and production of
14 documents. So, I think that's terrific.

15 Before I get into any more trouble, I will sit down
16 unless anybody has anything else to say.

17 There we go.

18 JUDGE SWAIN: Thank you, Judge Dein. I'm back.

19 The final action item on our agenda is the contested
20 stipulation enforcement motion of the Puerto Rico funds. And,
21 so, I understand that Mr. Cunningham intends to open with 12
22 minutes of argument?

23 MR. CUNNINGHAM: Yes.

24 Good morning, your Honor.

25 JUDGE SWAIN: Good morning.

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1 MR. CUNNINGHAM: John Cunningham, of White & Case, on
2 behalf of the Puerto Rico funds.

3 Your Honor, we are here this morning on the motion of
4 Puerto Rico funds to condition ERS's automatic stay on a
5 continuation of adequate protection for ERS's bondholders or,
6 alternatively, to enforce the parties' July 14 joint
7 stipulation approved by this Court.

8 One housekeeping matter, your Honor: The agenda
9 letter filed by the oversight board and AAFAF did not include
10 listing our reply that we did file on December 16th. That's
11 Docket No. 28. I alerted them to that. I just make note of
12 that, your Honor.

13 JUDGE SWAIN: Thank you. And I have reviewed all of
14 the filings.

15 MR. CUNNINGHAM: Thank you.

16 So, by way of background, your Honor, my clients, the
17 Puerto Rico funds, hold approximately 720 million of the
18 3 billion of ERS bonds. The Puerto Rico funds, your Honor, are
19 also Puerto Rico-based funds with on-island resident
20 shareholders, many of whom are retirees and other individuals
21 who rely on the fund's monthly dividends to meet their basic
22 living expenses.

23 Last Wednesday, your Honor held a hearing on summary
24 judgment regarding the ERS bondholders' liens. We were
25 jointly -- joint parties with Jones Day and their clients on

HCKKPUE1 CORRECTED 2

1 that matter. Mr. Bennett argued that. Your Honor took the
2 matter under advisement. We have absolutely no issue with
3 that, your Honor.

4 The issue today with this motion is interim adequate
5 protection. My clients in the ERS bondholder group,
6 represented by Mr. Bennett, argued for certain interim adequate
7 protection in the joint stipulation. As the Court will recall,
8 that bargain was hard-fought. The fight between the ERS
9 bondholders, and the commonwealth, and AAFAF over adequate
10 protection date back over a year ago before Judge Besosa and,
11 ultimately, before the United States Court of Appeals for the
12 First Circuit. The First Circuit earlier this year recognized
13 rights of ERS bondholders to adequate protection, which led to
14 the joint stipulated orders entered by Judge Besosa.

15 When this Title III case was filed, AAFAF again
16 refused adequate protection to ERS bondholders. The original
17 adequate protection motion was filed which the ERS bondholders
18 in May. Your Honor held a June 28th hearing on that motion in
19 San Juan and urged the parties to negotiate, and, ultimately,
20 that led to the joint stipulation.

21 Your Honor, the joint stipulation has two key
22 features. First is a path forward procedurally to resolve
23 AAFAF's lien challenges that led to a declaratory relief action
24 by ERS, agreed discovery and briefing schedule on summary
25 judgment motions, and an October 31st summary judgment hearing

HCKKPUE1 CORRECTED 2

1 scheduled, but subjected to the Court's schedule, but most
2 important for today's purposes, it provided adequate protection
3 for -- for ERS bondholders in two forms. The first is monthly
4 deposits of 18-1/2 million dollars from June to October and a
5 postpetition segregated account for the benefit of ERS
6 bondholders; and, two, the continued payment of monthly
7 interest to ERS bondholders from the prepetition segregated
8 account established by Judge Besosa's orders.

9 Equally important, your Honor, the joint stipulation
10 had two express safety valves for ERS bondholders. The first
11 was even though the 18-1/2 million postpetition costs ended on
12 October 1st, paragraph (c) provided rights of the ERS
13 bondholders to renew their request for adequate protection with
14 this Court, quote, on or after October 31st, 2017.

15 And secondly, paragraph (f) provided that monthly
16 deposits to the fiscal agent for the payment of interest on the
17 ERS bonds in accordance with the ERS bond resolutions would
18 continue until this Court's ruling on the summary judgment
19 motions.

20 Fast forward from the Court's approval of the July
21 joint stipulation to today. Puerto Rico is hit with Hurricanes
22 Maria and Irma in September. The parties were embroiled in
23 discovery disputes in the adversary proceeding, and the Court,
24 this Court, rescheduled a summary judgment hearing from
25 October 31st to December 13th. But that schedule triggered the

HCKKPUE1 CORRECTED 2

1 two safety valves in paragraphs (c) and (f) of the joint
2 stipulation.

3 First, it was optional for ERS bondholders at that
4 time to seek and renew further adequate protection requests as
5 to the \$18-1/2 million deposits, which did end on October 31,
6 but, secondly, there was a mandatory provision that ERS was
7 required to continue depositing monthly interest from the
8 prepetition segregated account, quote, for payment of interest
9 on the ERS bonds until the Court's summary judgment ruling.
10 That means November interest gets paid, and it was, and
11 December interest is to get paid, and that has not happened
12 because ERS failed to comply with paragraph (f) and deposit
13 those monies, so that the interest could be paid.

14 Your Honor, after the November interest was paid and
15 just three days prior to paragraph (f)'s November 20th deadline
16 for ERS to deposit its December interest payment, AAFAF sent a
17 stay violation notice to the Fiscal Agent Bank of New York on
18 November 20 demanding return of the November interest payment,
19 which it had already paid to BONY, which BONY had already paid
20 the bondholders in accordance with paragraph (f) and the ERS
21 bond resolutions.

22 AAFAF also failed to, as I pointed out, make the
23 November 20th payment of the December interest with the fiscal
24 agent as required by paragraph (f). So, faced with no
25 continuing 18-1/2 million monthly deposits and no further

HCKKPUE1 CORRECTED 2

1 interest payments, your Honor, we were left with no choice but
2 to file this motion. Every attempt and offer to AAFAF and the
3 board to resolve this motion has been flatly rejected.

4 In opposing the motion, AAFAF and the board failed to
5 meet their burden of showing adequate protection of the ERS
6 bondholders' liens and engaged in a contorted reading of the
7 joint stipulation that simply ignores its plain language.

8 First, as set forth in the original adequate
9 protection motion, Section 362(d) does apply in this Title III
10 case, and, specifically, it provides a court shall grant relief
11 from the automatic stay, including conditioning such stay, if
12 cause exists, including lack of adequate protection. Section
13 362(g) places the burden of proof on adequate protection
14 squarely on AAFAF and the board, and they failed to meet that
15 burden. They claim that the interest payments from June to
16 October, plus 92 million in the postpetition segregated
17 account, are sufficient adequate protection. They state at
18 paragraph 1 of their opposition, "No additional payments are
19 necessary to ensure the bondholders' purported security
20 interests are adequately protected pending the Court's decision
21 on summary judgment."

22 But they intentionally ignore the continuing harm to
23 ERS bondholders caused by the diversion of employer
24 contributions away from ERS to a new PayGo system established
25 by the commonwealth as of June 1st. Providing us no continuing

HCKKPUE1 CORRECTED 2

adequate protection is, per se, lack of adequate protection. Paragraph (f) of the joint stipulation provided for continued monthly payments until the Court's summary judgment ruling. That much is clear.

In short, the diminution of value of the bondholders' pledged properties by continuing to divert employer contributions away from ERS to the commonwealth's PayGo system is the harm that we are apparently suffering, and it requires continued adequate protection under Section 362(d).

Second, your Honor, AAFAF and the board argue that paragraph (d) of the joint stipulation overrides paragraph (f) when it provides interest on the ERS bonds shall be paid through the interest payment date on October 1st, 2017. They argue at paragraph 4 of the opposition that paragraph (f) does not require or authorize any payments to the bondholders and, instead, stayed the procedure for how ERS must transfer funds to BONY for a specified period of time. That's clearly wrong. It ignores the plain language of paragraph (f) that says that the monthly deposits with BONY until the summary judgment ruling by this Court is for the payment of interest on the ERS bonds in accordance with the ERS bond resolutions. Notably, paragraph (f) is virtually identical to language borrowed from Judge Besosa's April stipulated order, pursuant to which monthly interest was being deposited and paid by BONY to ERS bondholders, and AAFAF and the board have never argued that

HCKKPUE1 CORRECTED 2

1 such language was a procedural language that didn't authorize
2 payment to the bondholders.

3 Also, as BONY points out in their response letter to
4 AAFAF's state violation letter, ERS bond resolution expressly
5 referenced in paragraph (f) requires BONY to pay out interest
6 once those interest payments are received, not to hold it
7 awaiting further instruction from ERS.

8 Finally, their reading of paragraph (f) makes no
9 logical sense since it would simply transfer funds from one
10 restricted segregated account into another account that's
11 restricted being held at BONY. There's no benefit to the ERS
12 bondholders with that type of arrangement.

13 So, your Honor, why -- we ask, also, if this was a
14 payment procedure, why was the November interest payment
15 deposited, but the December interest payment wasn't deposited.
16 They talked out of both sides of their mouth.

17 JUDGE SWAIN: May I?

18 MR. CUNNINGHAM: Yes.

19 JUDGE SWAIN: Since time is getting short, I would
20 like you to address whether you have a different view of the
21 contractual commitment with respect to the 18 million five as
22 to which there were specific payment dates, and there is a
23 sentence at the end of paragraph 4.

24 (Continued on next page)
25

HCKJPUE2

1 MR. CUNNINGHAM: No dispute, your Honor. It ended,
2 those payments, deposits ended October 31, and we would have
3 to, similar to this motion, come back and request your Honor to
4 resume that.

5 JUDGE SWAIN: And do you consider yourselves to have
6 requested that or be requesting that by way of queuing this as
7 a renewal of the adequate protection motion?

8 MR. CUNNINGHAM: Correct, correct.

9 JUDGE SWAIN: And do you have any comments as to the
10 interaction between Section 305 of PROMESA and 362 (d), to the
11 extent you are asking me to impose a non-consensual requirement
12 of payment of funds?

13 MR. CUNNINGHAM: Understood, your Honor. I recognize
14 that your Honor's not likely to require them to make the
15 payment, but then the stay should be lifted.

16 JUDGE SWAIN: The stay should be lifted to allow what?

17 MR. CUNNINGHAM: To allow us to exercise whatever our
18 rights are to enforce our claims. If they're going to get the
19 benefit of the stay, they need to provide adequate protection.
20 If they're not going to provide adequate protection, the stay
21 should be lifted. It is the same position we were in when we
22 were before your Honor on June 28th.

23 JUDGE SWAIN: We didn't talk too specifically about
24 305 on June 28th, and so that issue did come into sharper focus
25 later with the PREPA bondholders' motion to lift the stay, and

HCKJPUE2

1 305 does have very broad language about direct and indirect
2 interference with revenues and with the exercise of
3 governmental powers, and we also talked at that time about 306
4 and exclusive jurisdiction over debtor property.

5 So that is why I am pressing you on what it would mean
6 to lift the automatic stay and why that wouldn't be a 305
7 problem, too?

8 MR. CUNNINGHAM: I understand. I do not expect your
9 Honor will force them to pay the 18 and a half million dollars.
10 Instead, you can condition the stay on them doing it if they
11 don't lift the stay.

12 Alternatively, your Honor, going to your point, we did
13 ask if your Honor was not inclined to do that, if you could at
14 least enforce the joint stipulation which your Honor did
15 approve and retain jurisdiction to enforce, and that would be
16 continued monthly interest payments.

17 JUDGE SWAIN: Thank you. Before you sit down, I have
18 a couple of other questions.

19 So in your most recent revised proposed order, you
20 incorporated some nomenclature changes requested by Bank of New
21 York. You also incorporated a specific, I gather, composite
22 interest number and an exculpatory provision for the Bank of
23 New York. So, first, as to the number, is it your
24 representation, are you making a representation as to the
25 derivation of that number, please?

HCKJPUE2

1 MR. CUNNINGHAM: First of all, by way of background,
2 your response which is pari passu with each other so it is not
3 subordinated in senior. We do have 85 percent of the mark
4 current interest bonds, and 15 percent of them are capital
5 depreciation or zero percent interest bonds.

6 This was an issue a raised with the Jones Day group
7 with us with respect to our motion because interest was being
8 paid out with current interest bondholders. There was a
9 concern about the effect of that on holders of capital
10 depreciation bonds which are not entitled to current interest.

11 For the purposes of adequate protection, our request
12 was to not increase the interest payment, but to allow a
13 sharing of that payment to go radically between holders of
14 current interest bonds and capital depreciation bonds based on
15 a decretal value for capital depreciation bonds. We had our
16 respective financial advisories and BONY work out that
17 schedule, so that is kind of the math that was put together and
18 is the result of that proposed form of order.

19 JUDGE SWAIN: And so the payments up to now had only
20 been distributed to the CIB --

21 MR. CUNNINGHAM: Yes.

22 JUDGE SWAIN: -- bondholders, and so --

23 MR. CUNNINGHAM: That's correct.

24 JUDGE SWAIN: -- so it would be spread among all the
25 bondholders?

HCKJPUE2

1 MR. CUNNINGHAM: Yes, going forward, for whatever
2 payments beginning with the December payment, yes, your Honor.

3 JUDGE SWAIN: And the 27 million and change number for
4 I think you called it December-January was calculated by
5 reference to the interest rates that are on the schedule that
6 you attached to the proposed order?

7 MR. CUNNINGHAM: Correct. It was the same 13.9
8 million that was always going to be paid. We are not asking
9 for more interest to come out of the segregated account.

10 JUDGE SWAIN: What is the legal authority for the
11 proposed release of the fiscal agent and whom did you intend to
12 bind by that?

13 MR. CUNNINGHAM: We borrowed that language from your
14 Honor's interpleader BONY decision when they interpleaded
15 COFINA monies and they wanted protection. This is an adequate
16 protection payment as opposed to actual payments being made
17 pursuant to the ERS bond resolutions or dictated by those terms
18 because right now the caps are not entitled to be paid current
19 interest.

20 The fact they would be sharing certain interest
21 payments on board, that is an adequate protection feature, and
22 they want a recognition they're complying with your Honor's
23 order and that is being deemed adequate protection as opposed
24 to payments directly under the bond resolution. They don't
25 provide for payment of current interest right now to the caps.

HCKJPUE2

1 JUDGE SWAIN: So that's intended to protect the bank
2 as against the universe of bondholders particularly CIB
3 bondholders who might have an issue with that and between you
4 and Mr. Bennett's firm, who represents some substantial portion
5 of those bondholders, but not all of them, I assume.

6 MR. CUNNINGHAM: Yes, we have clearly more than a
7 majority, but we don't have a hundred percent of those.

8 JUDGE SWAIN: And it is also intended to preclude the
9 debtor from any further contention that the November payment or
10 about irregularity of whatever payment arrangements are made
11 with respect to the distributions to the bondholders?

12 MR. CUNNINGHAM: Yes. If your Honor grants our
13 interpretation of the joint stipulation, we believe there is no
14 stay violation.

15 JUDGE SWAIN: Thank you.

16 MR. CUNNINGHAM: Thank you.

17 JUDGE SWAIN: Mr. Friedman.

18 MR. FRIEDMAN: Good morning, your Honor, Peter
19 Friedman from O'Melvary & Myers. So I wanted to mention Luis
20 Galasso, administrator of ERS, is in the San Juan courtroom.

21 Your Honor, so we think as an initial matter we argued
22 all along adequate protection is not appropriate at all aside
23 from the stipulation. I will get to the stipulation in a
24 moment. Under cases like Hunts Pier and rights, there is a
25 serious dispute as to the validity of means.

HCKJPUE2

1 The court doesn't need to grant adequate protection,
2 and we believe after all the arguments you have heard at least
3 at this time, the motion should be denied without prejudice, on
4 the grounds there remain continuing issues with respect to the
5 validity of the liens; and, therefore, no adequate protection
6 is necessary right now until the summary judgment determination
7 is made.

8 We also continue to believe the combination of 305 and
9 the bar on the court issuing orders with respect to government
10 property as well as the 305 decision impacted by the
11 government's PREPA ruling would also bar relief from the
12 automatic stay.

13 As a practical matter, we're still a little bit
14 perplexed as to how cash payments, putting aside the
15 stipulation, are actually adequate protection. Adequate
16 protection is supposed to protect payers against diminution in
17 the value of their collateral. The collateral isn't diminution
18 in value; it is a segregated account that can't be touched.
19 ERS is not using that collateral; therefore, that collateral
20 can't be diminishing in value. To us paying it out doesn't add
21 to their adequate protection. It is nice to have a cash
22 payment, but there is no reason to compel a cash payment.

23 With respect to the \$18.5 million monthly deposits, it
24 is conceded or not impacted by the stipulation. First of all,
25 as the retiree committee noted, all of this relates to the

HCKJPUE2

1 PayGo issue and whether it is appropriate for the commonwealth
2 to have implemented the PayGo matter. Frankly, therefore, we
3 don't think payments or dealing with adequate protection --
4 dealing with payments, adequate protection payments regarding
5 PayGo is appropriate. There is a completely separate adversary
6 proceeding with respect to PayGo, where Altair is the
7 plaintiff.

8 We submitted a motion to dismiss. An opposition is
9 due this week. That will be argued at some point. That deals
10 with PayGo and whether the conversion to PayGo is appropriate.
11 Taking by conversion of PayGo, the automatic stay bars the
12 commonwealth from implementing PayGo.

13 Those issues are dealt with there. It is not
14 appropriate to deal with a remedy for PayGo in this context.
15 Now, we also think -- and if we're actually right about PayGo,
16 they're not entitled to any adequate protection because none of
17 the employer contributions actually belong to them.

18 In addition, your Honor, we point to the segregated
19 \$92 million post-petition is providing ample adequate
20 protection for the time period before the summary judgment
21 motion is determined.

22 I want to focus on the stipulation because I think
23 that is where a lot of the discussion we just heard was focused
24 on. What you don't hear is as important as what you do hear.
25 What you didn't hear is that Paragraph C of the stipulation

HCKJPUE2

1 defines the term "briefing period" to which payments are
2 supposed to be made by reference to a schedule. That language
3 was not referenced in the presentation you just heard.

4 The language, "briefing period" shall mean the date
5 hereof include, and including the date the court renders a
6 ruling with respect to the parties' motions for summary
7 judgment on the declaratory relief action in accordance with
8 Schedule 1, defined term the briefing period.

9 When you look at Schedule 1, Schedule 1 actually has a
10 specific date.

11 JUDGE SWAIN: It doesn't have a specific date for the
12 court to resolve the summary judgment motions. It has a
13 specific target date for argument on the summary judgment
14 motions, but the definition of "briefing period" includes the
15 resolution of the summary judgment motion, so how do the
16 specific dates in Schedule 1 help you to constrain the date on
17 which I decide, and obviously I think everyone understands it
18 is not my practice to let grass grow under my feet, but I also
19 won't be bound by a specific resolution.

20 MR. FRIEDMAN: No, your Honor.

21 I think the parties were bound with the decision being
22 keyed off an argument on 10-31-2017. When that didn't -- not
23 an open-ended -- if the briefing period runs through 2018 or
24 2019 that we have to keep paying adequate protection, that we
25 agreed to an adequate protection payment based on an

HCKJPUE2

1 understanding of when everything that the parties had under
2 their control would end, and that is why a reference to
3 Schedule 1 is in there.

4 If it were solely the end of the briefing period and
5 then the point in which the point the court reached a decision,
6 there would be no reason to reference Schedule 1. It would say
7 Schedule 1 or any dates extended by the parties thereafter, or
8 it wouldn't just say Schedule 1. The word "Schedule 1" and the
9 dates of a highly compressed schedule have to be meaningful,
10 and what I proposed is to provide understanding what the
11 parties agreed to. We would pay adequate protection for the
12 parties to do everything they could on 10-31.

13 Your Honor, we also think that our reading of the
14 stipulation gives full meaning to Paragraph D. The opposing
15 side's reading of the stipulation just completely eviscerates
16 Paragraph D, it renders it complete surplusage, which I think
17 we cited statutory canons, the contractual interpretation
18 canons you're not supposed to do that. There is literally no
19 meaning to that paragraph if Paragraph F requires continued
20 payments to go on forever. That is not an appropriate way to
21 read a court stipulation which I think really should be
22 interpreted as a contract.

23 JUDGE SWAIN: Well, isn't it logical to read Paragraph
24 D as recognizing that in view of the schedule in Schedule 1,
25 there was certainty absent some other global settlement, that

HCKJPUE2

1 the interest payments for the period through October 1 would
2 have to be made because the briefing schedule would still be
3 going on, and then Paragraph F has the more conceptual,
4 open-ended mechanism tied to the briefing schedule as being the
5 ultimate determinant of the length of time for which additional
6 payments would have to be made.

7 So it doesn't seem to me that the reading of F as
8 giving content to an ongoing obligation necessarily subsumes or
9 de-voids of meaning Paragraph D.

10 MR. FRIEDMAN: Your Honor, I think for that to be the
11 right reading, you would just have the provisions in Paragraph
12 F in Paragraph D. Paragraph D would say payment shall be made
13 through the end of the briefing period as opposed to having a
14 date certain on which they ended, and another provision which
15 says something, which says, I think directly interpreted, that
16 you need to make a subsequent monthly payment because if you
17 make the October 1st payment and then you tee up money to give
18 to BNY in case it is necessary.

19 One potential interpretation of the stipulation, the
20 right stipulation, but at least one potential stipulation,
21 reading of the stipulation if the court were to conclude we are
22 not a hundred percent right, you have a continuing obligation
23 to make transfers of money to BNY under Paragraph F, but we
24 don't need to make the payments because payments are governed
25 by Paragraph D. That would make sense.

HCKJPUE2

1 JUDGE SWAIN: The language of Paragraph F as to
2 pre-October 31 interest transfers and the quote-unquote
3 briefing period interest transfers is the same. In both cases
4 they're barely parallel sentences with slight difference in
5 wording, but the key wording seems to be the same that ERS
6 shall cause money to be transferred, "for the payment of
7 interest on the ERS bonds in amounts necessary to pay
8 interest," and so if one was meant to be optional and just
9 moving a debt chair from one side of the book to the other, but
10 leaving the debt chairs in that protected environment, why
11 would there be the "shall" and "for the payment of interest"
12 and necessary language in both of those sentences?

13 MR. FRIEDMAN: Your Honor, again I think it is there
14 to at most permit or require the ERS to make the payments to
15 BNY so that if the court, say, goes into overtime, right,
16 post-October 31, and then issues an order, that order can be
17 complied with immediately.

18 If the court were to order we must continue to pay
19 adequate protection under some theory, whether it is
20 contractual or noncontractual, what would happen is ERS
21 wouldn't have to take intermediate steps. BNY would
22 immediately comply with that rather having to go through a
23 multi-step process to avoid the situation where money continues
24 to go out the door after the time period in which we
25 contractually agreed and have to go chasing after bondholders

HCKJPUE2

1 because interest payments are made after those set forth in
2 Paragraph D, the best way to harmonize the obligations under
3 Paragraphs D and F.

4 JUDGE SWAIN: I have a couple of -- well, finish your
5 presentation and I will ask questions.

6 MR. FRIEDMAN: Your Honor refreshed my recollection.

7 Paragraph F is a requirement to make very specific
8 deals with the requirement to make the payment to BNY on the
9 20th of the month rather than specific payment to bondholders
10 that come due the first of the month. That is why it really is
11 a mechanical provision of transfer, and that is why you have to
12 have a separate paragraph as opposed to Paragraph D which deals
13 solely with the payment of the monies transferred to F.

14 Sequentially, it might make sense to make Paragraph F
15 to D so you have the mechanics of getting the money out to BNY
16 first and the money out the door later. That is why we think
17 Paragraph F is mechanical.

18 I don't know if you want me to address any of the
19 questions you addressed to Mr. Cunningham. Look, if we are
20 wrong and BNY was authorized to make payments, it is a little
21 hard for me to argue it, that we should set up a cause of
22 action to BNY for having done something presently permitted to
23 do under the court order.

24 Likewise, if my understanding of the stipulation is
25 correct, under the revised order is correct, it does not

HCKJPUE2

1 increase our obligation, I don't think I have an issue. I
2 probably would like to have a chance to look at it in more
3 detail in the revised form of order to see if in any way, by
4 making a smaller interest payment to current, people currently
5 entitled to payments and making a larger payment to CABS
6 somehow changes the calculation of people's claims; for
7 example, people can assert because they got paid less interest,
8 now they have interest on top of interest in terms of
9 calculating the size of their claim, I don't know the answer to
10 that.

11 I want to be able to speak to our financial advisers
12 if the court is inclined to go down that road through requiring
13 payments. I don't think it is appropriate for the parties to
14 stipulate to something that increases ERS's liability. If it
15 is purely an issue that relates to inter-creditor allocations
16 and will have no impact on the overall liability of ERS, we
17 would not have an objection. If it in any way increases the
18 liability by deferring interest payments made to people
19 required to receive current interest payments, we are not okay
20 with that. Is that clear?

21 JUDGE SWAIN: Yes. Thank you. So that subsumes both
22 the inclusion of the CABS and any nomenclature issues with the
23 revised proposed order. If I decide that that contractual
24 obligation to pay interest is ongoing, you're asking for an
25 opportunity to review and consult on fine-tuning the proposed

HCKJPUE2

1 order?

2 MR. FRIEDMAN: Yes, or perhaps the other side will
3 agree no way that increases the size of anybody's claim, it has
4 no impact on the size of their claims, that would also be an
5 acceptable resolution. Thank your Honor.

6 JUDGE SWAIN: Thank you.

7 JUDGE SWAIN: Mr. Gordon.

8 MR. GORDON: Good morning, your Honor. Robert Gordon
9 of Jenner & Block.

10 JUDGE SWAIN: Good morning.

11 MR. GORDON: Adequate protection is obtainable in
12 bankruptcy only under limited circumstances, and that makes
13 sense because a creditor seeking adequate protection payments
14 essentially is seeking to jump ahead of other creditors and
15 carve out monies from the debtor's precious cash flows ahead of
16 other creditors.

17 The bondholders referred to two pre-Title III adequate
18 protection stipulations, and I would submit it was completely
19 irrelevant. Those were not entered by this Court in a Title
20 III case. They were not entered through a bankruptcy regime.
21 They were not entered with participation of the collective
22 interest of creditors. The only thing that is relevant is
23 whether the parties are entitled to adequate protection under
24 the -- (inaudible) -- I would say they are not at least to
25 date.

HCKJPUE2

1 To be entitled to adequate protection, the creditor
2 must, there must be at least two things that are established:

3 One is that the creditor has a lien in an asset of the
4 debtor; and, number two, the asset is diminishing in value as a
5 result of the automatic stay. Neither of those elements have
6 been established to date. The bondholders would have this
7 court treat them as if it already established both things, and
8 that is not appropriate.

9 If the alleged collateral we are focusing on is, for
10 example, pre-petition account, both ERS and the retiree
11 committee have disputed that the bondholders have a lien in
12 that cash, and that was the subject of the arguments last week
13 before this Court. So it has not yet been established they
14 even have a lien in that cash.

15 In addition, there is no ability to establish that
16 that cash is diminishing, as Mr. Friedman in his papers has
17 indicated, that account remains intact. To the extent monies
18 have been taken out of that account, they have only been
19 transferred to the bondholders.

20 If the collateral in question is the post-petition
21 account, as Mr. Friedman has indicated in his papers, that
22 account has not been disturbed at all. In fact, it has grown
23 to 92 and a half million dollars over time, so it is not
24 diminishing in value.

25 The bondholders also argue throughout their papers

HCKJPUE2

1 that they have a lien in post-petition payments by municipal
2 entities central government under the PayGo system. Both the
3 retiree committee and the ERS strongly dispute that issue, and
4 as Mr. Friedman has indicated, that is a matter being dealt
5 with in a separate adversary proceeding.

6 But if the bondholders are correct on that argument,
7 they are essentially saying they have a lien in a perpetual,
8 recurring, robust revenue stream, which leads to intellectual
9 conclusions. One, there can be no meaningful diminishing in
10 the value of the collateral. It is recurring. Two, if it is
11 true, the bondholders are over-secured. Under the bankruptcy
12 code, an over-secured creditor is not entitled to adequate
13 protection payments at all.

14 Pending a determination of the bondholders' lien
15 rights, the normal course of action in a bankruptcy case would
16 be to escrow any adequate protection payments, and that was
17 essentially what this Court suggested in the June 28th hearing.
18 For reasons unknown to the retiree committee, however, a joint
19 stipulation was submitted to the court without being passed by
20 the retiree committee that actually provided for payments,
21 outright payments to the bondholders pending this
22 determination.

23 The retiree committee filed the reservation of rights
24 without any determination of predicates for adequate
25 protection. The bondholders actually received \$55.5 million.

HCKJPUE2

1 They were receiving adequate protection payments before it has
2 been determined they're even entitled to adequate protection
3 payments.

4 I guess we are here today to say that enough is
5 enough. As to the November 1 interest payment that is being
6 argued about here, I would say this: It is a red herring. The
7 bottom line is that both ERS and BNY acted erroneously. ERS
8 should never have transferred the money to BNY Mellon on
9 October 20th because the stipulation clearly indicates that
10 they're only entitled to interest payments through October, and
11 BNY Mellon should have asked, when it received the payment with
12 the transferred monies, whether there was supposed to be an
13 interest payment on November 1 because they clearly under the
14 stipulation are not entitled to interest payment on November 1.
15 They both acted erroneously, in my opinion.

16 That does not create rights that don't exist under the
17 stipulation, to argue that the stipulation by any plain reading
18 does not, is not perpetually, not self-executing after October
19 31. Arguments to the contrary lift partial language segments
20 and quote them out of context, as Mr. Friedman also indicated.
21 The stipulation itself does not provide a basis for adequate
22 protection payments beyond October.

23 For the reasons I have already stated, the factual
24 circumstances in law do not provide a basis for continuing
25 adequate protection payments. There simply is no established

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1 basis at this time. Accordingly, your Honor, we ask that the
2 bondholder motion be denied. Thank you.

3 JUDGE SWAIN: Our specialist is coming back again, so
4 let's take -- here he is. The buzzing came back again over
5 while the last speaker was speaking.

6 (Pause)

7 JUDGE SWAIN: The phone line is clear. Is the court
8 reporter able to do his job when the buzzing is audible in
9 here?

10 THE REPORTER: Sometimes.

11 JUDGE SWAIN: Let's all be as clear as we can in
12 speaking. Mr. Court Reporter, if you need to stop the speaker
13 and ask for something to be repeated, please do so. I
14 understand everybody else.

15 LAW CLERK: The phone line just cut out.

16 JUDGE SWAIN: Let's just take, I'll call it a
17 five-minute break, which is a break that people come back from
18 as quickly as possible while the phone is being sorted out and
19 I'll continue.

20 (Recess)

21 JUDGE SWAIN: Please be seated.

22 I understand that Mr. Schaffer from Bank of New York
23 wishes to be heard.

24 MR. SCHAFFER: Your Honor, Eric Schaffer from Reed
25 Smith for Bank of New York Mellon. There are three points I

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1 would like to make quickly:

2 First, we are the fiscal agent under the resolution
3 that binds ERS as well as us, and we have a limited
4 administrative role. We receive funds from ERS, and on the
5 dates determined by the resolution, we are required to make
6 payments to the bond owners. Consistent with the resolution,
7 we have no liability for performing that duty. Absent
8 direction from the court, we would perform our limited duties
9 solely under the resolution in the ordinary course;

10 The second point is a response to adequate protection.

11 JUDGE SWAIN: Please project into the microphone.

12 Thank you.

13 MR. SCHAFFER: Yes, your Honor.

14 Second, with regard to adequate protection, following
15 up on some of the court's questions, the resolution does not
16 provide for payments on the capital appreciation bonds, the
17 CABS but, of course, the court could order that as adequate
18 protection. If the court does do so, we would need clear
19 direction with regard to our role and responsibility, clarity
20 with regard to each security. The revised form of order would
21 do just that.

22 Of course, the form of order would depart from the
23 terms of the resolution, and that's why it is important to have
24 what you referred to as the exculpatory language. That ensures
25 that we are not exposed to liability, whether to CABS or anyone

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1 else, for complying for the court's order on adequate
2 protection.

3 The last point, your Honor, is responding to what I
4 believe are misstatements that have been made in the papers or
5 in arguments. We are not a party to the stipulation. I think
6 that since the opposition was filed by ERS, counsel for FOMB
7 has confirmed that it was negotiated without our involvement
8 and it was presented without our knowledge.

9 Consistent with the resolution, your Honor, we
10 received funds on October 18th. We made a distribution on
11 November 1. There was no requirement that we receive or
12 request some sort of second confirmation. Again, we are not
13 party to the stipulation and we don't have a duty to police the
14 ERS or to ask do you really, really want to make this payment.

15 What happened is that on November 17, 30 days after we
16 received the payment, 16 days after it was distributed as
17 required under the resolution, we received a letter telling us
18 that ERS thought distribution was improper. We understand that
19 ERS may regret having sent the monies, but there is no basis to
20 blame the fiscal agent for acting in accordance with the
21 resolution. There is no basis to impose additional duties.

22 Your Honor, I believe you have seen the letter that we
23 sent?

24 JUDGE SWAIN: Yes, I have.

25 MR. SCHAFFER: I don't think I have to add anything to

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1 that. I just conclude we simply performed our administrative
2 functions in accordance with the resolution.

3 Thank you, your Honor.

4 JUDGE SWAIN: Thank you, Mr. Schaffer. And now,
5 Mr. Cunningham, you're back.

6 MR. CUNNINGHAM: Thank you, your Honor.

7 In brief reply, the first thing I would like to say is
8 during the break I had a chance to talk with my client. I want
9 to clarify one thing. Your Honor, if your Honor were to
10 enforce the joint stipulation on the monthly interest payments
11 the way we ask your Honor to do, we would withdraw our request
12 without prejudice as to the 18 and a half million dollar
13 post-petition deposits so we don't have to get into the 305
14 arguments. Basically our alternative relief would be the leave
15 we are asking for today if your Honor were to grant it.

16 With respect to FOMB arguments, the first is one how
17 can cash payments constitute adequate protection. I would note
18 Bankruptcy Code Section 361 entitled, "Adequate protection in
19 Subsection 1," specifically says cash payments or periodic cash
20 payments can be adequate protection.

21 Secondly, on the Schedule 1 point, your Honor was
22 spot-on. Schedule 1, which I have in front of me, says as to
23 deadline, the last deadline of October 31, 2017 was with
24 respect to a hearing on the motion for summary judgment, but
25 specifically says subject to the court's schedule. So there

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1 was no firm deadline either as to the October 31 hearing or
2 certainly this Court's summary judgment ruling which no party
3 would know when your Honor would render that ruling. There is
4 no firm deadline, as they argue in their papers.

5 The last point about Paragraph F being mechanical
6 because it requires monthly interest deposits with BONY on the
7 20th of each month preceding the payment date, this is
8 mechanical only because it helps BONY to actually get ready to
9 make the payment on the 1st of each month. This is, as I said,
10 carryover language identically from Judge Besosa's order
11 entered in April of 2017.

12 So this isn't something new we invented. This is a
13 mechanical feature to address the feature when BONY receives
14 the payment, it needs to prepare and transfer and make the
15 interest payments on the 1st. Otherwise, the language was
16 always consistent, they still needed to make the payment.

17 If, as the retiree committee, your Honor, counsel
18 suggested we're right in our arguments, then we are
19 over-secured creditors not entitled to adequate protection.
20 Your Honor, the Commonwealth of FOMB and the oversight board
21 argued that very point to the First Circuit in January, and the
22 First Circuit found we were entitled to adequate protection and
23 remanded this back to Judge Besosa which, of course, led to the
24 stipulated orders we had through Title III which are, of
25 course, relevant to the issue of adequate protection because it

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1 framed the issue starting with the first circumstance, Judge
2 Besosa leading up to the Title III cases. That framed the
3 joint stipulation, and that is where the mechanism of continued
4 monthly payments arises, and we ask it just continue as
5 provided in the stipulation.

6 JUDGE SWAIN: Thank you.

7 MR. CUNNINGHAM: Thank your Honor.

8 JUDGE SWAIN: If you will all bear with me for just a
9 moment while I reflect, I will rule on this. (Pause)

10 I have reviewed carefully the written submissions of
11 all of the parties and listened carefully to the arguments made
12 in court today. The court will now rule on the bondholders'
13 motion. This oral opinion constitutes the court's findings of
14 fact and conclusions of law for the purposes of Federal Rule of
15 Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure
16 52.

17 The court has jurisdiction of this contested matter
18 pursuant to Section 306 of PROMESA. The bondholders have
19 acknowledged with respect to the obligations of ERS under the
20 stipulation that the contractual obligation relating to
21 additional payments of \$18.5 million per month expired, and the
22 bondholders have withdrawn their request for continuation of
23 that payment schedule further as a matter of adequate
24 protection, and so I turn to the provisions of the joint
25 stipulation regarding interest-related transfers of

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pre-petition funds.

As to that, the court finds that the joint stipulation is more open-ended and that reading Paragraphs C, D and F of the stipulation together, the court concludes that ERS agreed to continue to make such transfers in accordance with the schedule and mechanics set forth in Paragraph F through the briefing period as defined in the stipulation which ends upon the court's resolution of the summary judgment motions.

The court rejects as unfounded in the text of the joint stipulation ERS's contention that such transfers and/or distributions to bondholders of amounts transferred after October 1, 2017 were optional. Rather, ERS remains obligated through the briefing period to transfer to BNY Mellon as fiscal agent "for the payment of interest on the ERS bonds," and then I again quote, "the amount necessary to pay interest on the ERS bonds due and payable on the first day of the next succeeding month in accordance with the ERS bond resolutions."

And so it is an obligation to transfer the monies in aid of distribution of those interest payments to bondholders. One moment. (Pause)

So all arguments and objections having been considered and either withdrawn or overruled, to the extent consistent with this oral ruling, the ERS bondholders' motion is granted to the extent that ERS must continue to transfer monies calculated by reference to interest payments in accordance with

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1 Paragraph F of the joint stipulation during the briefing
2 period, and BNY Mellon is to distribute such monies to
3 bondholders. The motion is denied in all other respects.

4 I am directing the parties to confer regarding the
5 form of order since there are issues with respect to recipients
6 of the distributions, the nomenclature and the issues that BNY
7 Mellon has raised, and those I think require some further
8 processing and exploration on at least FOMB's part.

9 So I would like you to confer and present to me by the
10 27th of December an agreed form of order, or if no agreed form
11 of order is achieved, then a further revised proposed order
12 with objections accompanying that submission of the order so
13 that I can consider and then determine the form of order to
14 enter. Are there any questions about that procedure?

15 Very well, then. Thank you all very much.

16 There are several matters that have been carried over
17 for the February Omni, and we will be reconvening for oral
18 argument on January 10th of pending motions. Is there anything
19 further that we need to take up together this morning?

20 Seeing no hands raised, I thank you all and I wish you
21 happy and safe holidays and safe travels for those who are
22 traveling, and again our best wishes and thoughts are with our
23 colleagues and the people of Puerto Rico on the island.

24 Good morning.

25 (Court adjourned)

